

NEW HAMPSHIRE LAW LIBRARY

October 8, 1958

OCT 01 1998

CONCORD, N.H.

Mr. James W. Nelson
Deputy Bank Commissioner
State House
Concord, New Hampshire

Dear Mr. Nelson:

This is in reply to your letter of October 6, 1958 with which you enclosed a letter from Eugene C. Struckhoff, Esq., Attorney for the Merrimack County Savings Bank of New Hampshire, to the Bank Commissioner dated October 6, 1958 in which Mr. Struckhoff raised three questions relative to a proposed participation loan to the Dorr Woolen Company by Merrimack County Savings Bank as a participating lender, and the Sugar River Savings Bank as originating lender.

In his letter Mr. Struckhoff states that the proposed loan is in the amount of \$397,000, \$250,000 of which would be loaned by the Merrimack County Savings Bank as participating lender, and \$147,000 of which would be loaned by the Sugar River Savings Bank as originating lender. It is further explained that the loan participation agreement between Merrimack County Savings Bank and Sugar River Savings Bank would provide that payments as received be applied first to the payment of interest to the Merrimack County Savings Bank, second to the payment of interest to the Sugar River Savings Bank, and third to the principal balance owed to the Merrimack County Savings Bank, Sugar River Savings Bank not to receive any payments on principal until such time as Merrimack County Savings Bank has been paid in full. To secure the payment of the indebtedness a first mortgage deed of real estate of Dorr Woolen Company would be granted to the Sugar River Savings Bank as originating lender together with a chattel mortgage on certain machinery and equipment. In the event of a foreclosure the proceeds of the foreclosure sale would be applied first to the payment of the indebtedness to Merrimack County Savings Bank and second to the payment of the indebtedness to Sugar River Savings Bank.

Mr. Struckhoff first inquires whether the proposed participation loan as fully outlined above may properly be made. In our opinion the answer to Mr. Struckhoff's first inquiry is in the negative. We have

COPY

Mr. James W. Nelson
Deputy Bank Commissioner

-2-

10/8/58

carefully examined RSA 387:1 XIII which defines the term "originating lender", RSA 387:1 XIV (supp) which defines the term "participating lender" and RSA 387:1 XV (supp) which defines the term "participating loan". We have also carefully scrutinized the provisions of RSA 387:17 (supp) relating to participating loans. It is clear from the foregoing statutory provisions that participating mortgage loans are restricted to such mortgage loans as are legal investments for savings banks in New Hampshire. Under RSA 387:4 first mortgages on real estate and certain types of equipment and machinery are classified as legal investments. Second mortgages are not so classified. We are of the opinion that the proposed participating loan as defined in Mr. Struckhoff's letter would constitute the Sugar River Savings Bank as originating lender nothing more than a second mortgagee, and therefore we do not believe the proposed loan is permissible under existing statutes.

Mr. Struckhoff next inquires whether or not the participation loan would be permissible if the participation loan agreement were to provide for the payment of the principal balance to Merrimack County Savings Bank before any payments to Sugar River Savings Bank, but were to provide further that in the event of foreclosure of the mortgaged security that the proceeds thereof would be applied to the satisfaction of the indebtedness to the originating lender and the participating lender in proportion to the then outstanding balance of the indebtedness owed to each of them. We are of the opinion that the answer to this inquiry must also be in the negative. In our view the Legislature enacted the participating loan provisions in RSA 387 to enable New Hampshire lending institutions to serve the needs of borrowers whose requirements for borrowed capital were beyond the legal lending capacity of the institution. We cannot believe that the Legislature contemplated any arrangement whereby a preference is created between the originating and participating lender. We believe that a participating loan, as contemplated by the Legislature, is one in which payments received by the originating lender on account of the loan are applied to the satisfaction of the indebtedness to the originating and participating lender pro rata in accordance with the extent of participation by the participating lender or lenders and the originating lender.

In his letter to the Bank Commissioner Mr. Struckhoff points out the fact that Mr. George Dorr, who is the President of the prospective borrower, Dorr Woolen Company, is also the President of the originating lender, Sugar River Savings Bank. We are advised by the Bank Commissioner's office that Mr. George Dorr is also the principal owner and stockholder of the Dorr Woolen Company. RSA 386:7 provides that "No Savings bank shall make a loan to any of its officers . . . unless all the trustees of the bank have consented thereto in writing". Mr. Struckhoff inquires whether or not this section is applicable so that the proposed participating loan would require the consent in writing of all of the trustees of the Sugar River Savings Bank. Our answer is in the affirmative. In our view this is

ATTORNEY-GENERAL

C O P Y

Mr. James W. Nelson
Deputy Bank Commissioner

-3-

10/8/58

clearly a case where the corporate veil should be pierced since Mr. Dorr is not only the President, but also the principal owner and stockholder of the Dorr Woolen Company. A loan to the Dorr Woolen Company is in substance a loan to Mr. George Dorr which must meet the requirements of RSA 386:7. In other words, in applying the provisions of RSA 386:7 we must look to the substance rather than the form of the transaction.

Very truly yours,

GTR,Jr/m

George T. Ray, Jr.
Assistant Attorney General